Dish Network Service Corp. *and* Local 1108, Communications Workers of America, AFL–CIO. Case 29-CA-24670

August 21, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND ACOSTA

On June 27, 2002, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[1] and conclusions[2] as modified and to adopt the recommended Order.[3]

The judge found that the Respondent violated Section 8(a)(1) of the Act by telling employees that the Respondent did not recognize the Union's shop stewards. He also found that the Respondent violated Section 8(a)(5) and (1) by refusing to provide a copy of a disciplinary consultation sheet to Steward Sean Ambrose and by telling Ambrose that he should make his request to his union representative, who could then ask for the information from the Respondent's attorney. As explained below, we agree with the judge on both issues.

1. McCann's nonrecognition statement

On December 9, 2001, field service technician Derrick Durant returned late from his route. On December 12, when Durant arrived at work at 7 a.m., his supervisor, Field Service Manager Thomas Murphy, informed Durant that Murphy had to write him up for returning late. When Durant asked that a shop steward be present during the meeting, Murphy gave his permission. David Gerace, a union steward, participated in the meeting, asking Murphy to clarify certain statements. Murphy then gave Durant an oral warning and told him to be more careful in the future.

Later that day, Human Resources Generalist Lynn DiPietro informed Murphy that Durant's oral warning must be memorialized in written form. She gave Murphy a sample employee consultation form that contained an "action plan" designed "to keep an eye on Derrick's traveling times and keep in contact with him." Still later, Murphy again met with Durant, who was represented by Steward Brian Feldman. Feldman advised Durant not to sign the consultation form, and Durant followed that advice. Durant worked the entire day and returned to the facility at about 5:30 p.m. When he reported to the manager's office to return his paperwork, he was met by Manager Charles Jerabek, DiPietro, Murphy, and General Manager Daniel McCann. McCann asked Durant to sign the employee consultation form. Durant refused and asked that a steward be present. After this request was refused, Durant asked Feldman to come into the office. According to the credited testimony of Durant and Feldman, McCann said that Feldman could not enter the office because the parties had no contract, and the Respondent did not recognize the shop stewards.

As the Board has previously held, a unionized employer's statement that it will not recognize the union's stewards violates Section 8(a)(1). *Morse Operations, Inc.*, 336 NLRB 1090, 1099 (2001).[4] We, therefore, agree with the judge that McCann's statement was unlawful.

In exceptions, the Respondent argues that the judge erred in crediting the testimony of Durant and Feldman regarding McCann's statement. The judge credited Durant and Feldman because "their versions of the statements made by McCann are consistent and believable given the fact that McCann refused to permit the steward to be present during the discipline of Durant, and given the Respondent's policy of not recognizing the steward's right to be present during disciplinary interviews, or permitting the steward to be present but not participate." The Respondent argues that the judge's credibility determination must be rejected because the Company does not have an unlawful policy relating to the recognition of stewards and because Feldman was lawfully excluded from the meeting.

We find that the judge's crediting of Durant and Feldman is supported by the Respondent's other statements and conduct that were consistent with a policy of not recognizing the stewards' right to be present during disciplinary interviews, but not by McCann's refusal to permit Union Steward Feldman to be present during the discipline of Durant.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] No party excepted to the judge's dismissals of the allegations that the Respondent unlawfully threatened Derrick Durant, refused to recognize the Union, and reneged on an agreement resolving Durant's grievance.

[3] We shall modify the judge's recommended notice, substituting the Board's usual language for that of the judge.

[4] The absence of a contract is not a lawful reason for a unionized employer's refusing to recognize stewards. *Frankline Inc*., 287 NLRB 263 fn. 7 (1987).

Whether or not the Respondent actually had such a policy of refusing to recognize the Union's stewards, its statements and actions during and following the afternoon meeting are consistent with Durant's and Feldman's account of McCann's remarks. The judge could reasonably rely on such evidence in crediting their testimony. The record shows that DiPietro made nonrecognition statements similar to McCann's at the late afternoon meeting. DiPietro admitted that she "explained to Brian Feldman that he was not to be present" because there was "no grievance procedure" and "there was no contract." McCann also admitted that DiPietro cited the lack of a collective-bargaining agreement as one of the reasons Feldman had to leave.[5] Following the meeting, DiPietro unlawfully refused to furnish Steward Sean Ambrose with a copy of Durant's disciplinary consultation form, even though she knew Ambrose was a steward (see part 2 below).

The record also shows that DiPietro continued to espouse an illegal policy at the hearing. When asked whether it was appropriate for a steward to be present at the investigatory meetings held on the morning of December 12, she testified, "I don't see a reason for the shop steward to be there, no."[6] DiPietro's statement is contrary to the well-settled principle that employees have the right to union representation in investigative meetings that they reasonably believe could result in discipline. *NLRB v. J. Weingarten*, 420 U.S. 251, 257–260 (1975). Because Durant could reasonably have believed that discipline could result from the morning meetings (as, indeed, it did), he was entitled to have a steward present at those meetings. DiPietro's testimony indicates that Durant would have been denied this right had the issue been placed before DiPietro at the time.[7]

Although the evidence discussed supports the judge's crediting of Durant and Feldman, McCann's refusal to permit Feldman to be present during the discipline of Durant does not. Employees have the right, under *Weingarten,* to representation in investigative meetings that they reasonably believe can result in discipline, but there is no such right at a meeting devoted entirely to the administration of predetermined discipline. *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979). That was the apparent purpose of the later afternoon meeting, and the General Counsel has not alleged that the Respondent acted unlawfully in banning Feldman from that meeting. Because there is no contention that McCann unlawfully denied Feldman access to that meeting, we do not rely on his action in finding that the judge properly credited Feldman and Durant.[8]

In the dissent, Member Schaumber contends that, contrary to the judge's finding, the Respondent had no policy of not recognizing stewards and that, in context, McCann's statement was "at most a de minimis violation of the Act," not warranting a Board order.[9] He also urges that, because the parties' collective-bargaining relationship was in its infancy, the Union should not be allowed to "interrupt and distort the bargaining process by pursuing a rigid and mechanistic application of the Act to such an isolated remark." We are not persuaded by these arguments.

The issue here is not whether the Respondent actually had a policy of refusing to recognize the Union's stewards in disciplinary proceedings. The question, rather, is whether McCann's statement—that Feldman could not enter the office because the parties had no contract and the Respondent did not recognize the shop stewards—reasonably tended to coerce employees in the exercise of their Section 7 rights. It clearly did.

McCann is the Respondent's general manager. He made his remark in the presence of DiPietro, the Respondent's human resources generalist, who made similar comments of her own and whose later statements and unlawful conduct were fully consistent with McCann's statement. Employees, then, could reasonably conclude that McCann spoke for the Respondent. McCann's remark, in turn, tended to create the impression that employees had to wait until contract negotiations were suc-

[5] Our dissenting colleague's assertion that "there is no evidence any employee was aware of [DiPietro's] view at the time of McCann's statement" is simply wrong. McCann testified that DiPietro stated, in the presence of employees, that the absence of a collective-bargaining agreement was one of the reasons Feldman should leave.

[6] The dissent's suggestion that DiPietro's hearing testimony was her "personal view" is contradicted by the record. At the hearing, DiPietro was asked, "In your opinion *as the Human Resources generalist* for that part of the region, was it appropriate for a union steward to be present at the early morning meeting, when Mr. Murphy was explaining the behavior?" (Emphasis added.) She responded, "I don't see a reason for a shop steward to be there, no." Thus, DiPietro's testimony reflects her professional view, not her personal one. Moreover, the position she took at the hearing is consistent with the accounts that she and McCann gave of her statements on the afternoon of December 12.

[7] Murphy allowed Gerace and Feldman to attend the morning meetings, but only because he did not understand the Company's approach in these matters. When asked, "What was your reaction when Ms. DiPietro said that the steward [Feldman] could not be present [at the afternoon meeting], when you had already permitted a steward to be present at two prior [morning] meetings on this issue," Murphy testified, "Basically, I had no reaction. Like I said, I was—I was fairly new to the position and, you know, I figured Lynn has more experience in this matter, so what she did was the better of the two options."

[8] We also disavow fn. 5 of the judge's decision, which wrongly implies that Feldman had a right to participate in the afternoon meeting. *Consolidated Edison of New York*, 323 NLRB 910 (1997), does not stand for that proposition.

[9] The Respondent did not make the de minimis argument; the dissent has raised it sua sponte**.**

cessfully completed before the Respondent would recognize the Union's shop stewards. It, thus, communicated to employees the futility of trying to deal with the Respondent through their own designated representatives.

Sending such a message is not a de minimis violation,[10] particularly where, as here, the Respondent has committed other related violations.[11] Despite the dissent's assertion, there is no evidence that the filing of the charge, or the processing of the complaint, somehow harmed the collective-bargaining process. Nor does the dissent cite any authority suggesting that the Board would be authorized to withhold remedies available under the Act, even if that had been the case.

2. DiPietro's refusal to provide information to Ambrose

Some time after December 12, Shop Steward Sean Ambrose asked DiPietro for a copy of Durant's disciplinary consultation form. DiPietro responded that Ambrose could "speak to his union representative and request it through our attorney." We agree with the judge, for the reasons stated in his decision, that the Respondent violated Sections 8(a)(1) and (5) by refusing to provide Ambrose a copy of the form and by telling him to request it from the Respondent's attorney.[12]

In its exceptions, however, the Respondent contends for the first time that, "there is no evidence to indicate that Mr. Ambrose was acting in the capacity of a Union steward when he made the request." We find no merit in this argument. DiPietro admitted that she knew Ambrose was a steward. She did not tell Ambrose, or testify at the hearing, that her refusal to give the information was based on a belief that Ambrose was not acting in that capacity. Nor did the Respondent make any such argument to the judge. Thus, this contention is both baseless and untimely raised. See Rules and Regulations of the National Labor Relations Board, Section 102.46.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Dish Network Service Corp., Farmingdale, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the attached notice for that of the administrative law judge.

MEMBER SHAUMBER, dissenting in part.

Assuming arguendo that the Respondent violated Section 8(a)(1) through General Manager Daniel McCann's remark that the Respondent did not recognize the Union's shop stewards as the employees' collective-bargaining representative, I find the violation is at most de minimis. This is because when the remark is properly considered within the context of the disciplinary situation in which the statement was made, a context in which the Respondent was not legally required to permit a steward's presence in the first place, and in light of evidence that prior to the time the remark was made the Respondent did recognize and deal with stewards of the newly certified Union, it cannot be said that McCann's isolated and offhand remark reflects a policy of refusing to deal with the stewards as the bargaining representatives of the unit employees. It, therefore, warrants neither the issuance of a Board order nor the imposition of a remedy.[1] Rather, where, as here, a collective-bargaining relationship is in its infancy and the parties are still negotiating a first collective-bargaining agreement, the Board should hesitate before permitting either party to interrupt and

[10] Member Liebman finds, contrary to the dissent, that McCann's statement is more coercive because it was made in the early stages of a bargaining relationship, at a point when employees are more susceptible to coercion because they may have an incomplete understanding of their rights under the Act.

Member Acosta finds it unnecessary to analyze the alleged degree of coercion attributable to the fact that the parties' bargaining relationship was in its early stages.

[11] The cases cited by the dissent in support of its de minimis argument—*Bellinger Shipyards, Inc.*, 227 NLRB 620 (1976); *Musicians Local 76 (Jimmy Wakely Show)*, 202 NLRB 620 (1973); *Wichita Eagle & Beacon Publishing Co.*, 206 NLRB 55 (1973); and *Square D Co.*, 204 NLRB 154 (1973)—are inapposite. In those cases, unlike here, the unlawful conduct had been substantially remedied or effectively contradicted by later conduct. *Golub Corp.*, 338 NLRB 515, 517 fn. 18 (2002).

[12] Arguing before the judge, the Respondent defended its refusal by claiming that it had provided the documents to its attorney for distribution to the Union during collective-bargaining negotiations. The judge properly rejected this defense. In addition to the reasons given by the judge, we find no persuasive evidence that Durant's disciplinary form was among any documents provided to the Union in time to be responsive to the steward's request, or that the parties had agreed to process all information requests, regardless of intended use, through their attorneys. In any case, the Respondent has abandoned this argument in its exceptions.

[1] As to the 8(a)(5) violation, I reluctantly concur in affirming the judge's finding that Respondent violated Sec. 8(a)(5) by refusing to provide a copy of a disciplinary consultation sheet to Steward Sean Ambrose, and by telling Ambrose that he should make his request to his union representative, who could then ask for the information from the Respondent's attorney. I note that Respondent has abandoned its previous argument that it was responding to such information requests through its attorney in contract negotiations and the Union subsequently obtained the requested copy through this process. If Respondent raised this argument before the Board, it might have a valid defense of its failure to provide the requested information directly to Ambrose. However, Sec. 102.46(b)(1)(iv) of the Board's Rules requires that "[e]ach exception . . . shall concisely state the grounds for the exception." The Respondent's sole contention in its exception to the 8(a)(5) finding is that Ambrose was not acting in his capacity as shop steward when he requested the document. This contention lacks merit.

distort the bargaining process by pursuing a rigid and mechanistic application of the Act to such an isolated and incidental remark.

Facts

The Union was certified on June 21, 2001.[2] Following certification, the parties commenced bargaining for an initial contract. Without objection from the Respondent, employee Stewards Sean Ambrose, Brian Feldman, and David Gerace attended the bargaining sessions. The parties did not reach an agreement before the events at issue occurred.

As to these events, on the morning of December 12, Field Service Manager Thomas Murphy informed field service technician Derrick Durant that he would be written up for returning late from his work route on December 9. Durant asked that a shop steward be present. Murphy then permitted Steward Gerace to participate in the meeting, which ended with Murphy giving Durant an oral warning and essentially telling him to be more careful in the future. Later on December 12, Human Resources Generalist Lynn DiPietro directed Murphy to memorialize Durant's oral warning in a written consultation form. When Durant returned from his route that day, General Manager Daniel McCann and other management officials, including DiPietro, met with Durant. McCann requested that Durant sign the consultation form. Durant refused. Durant then asked Steward Feldman, whom Durant saw passing by, to come into the office. According to the credited testimony of Durant and Feldman, McCann said that Feldman could not enter the office because the parties had no contract, and the Respondent did not recognize the shop stewards.[3] The judge found, and my colleagues agree, that McCann's statement constituted a violation of the Act that warrants the imposition of a Board order and remedy.

Analysis

In adopting the judge, my colleagues concede, as they must, that McCann lawfully refused to permit Steward Feldman to be present during management's afternoon meeting with Durant. They correctly point out that employees do not have a *Weingarten*[4] right to representation at a meeting devoted entirely to the administration of predetermined discipline. But, as pointed out above at footnote 3, the only remarks and actions on the part of the Respondent that would indicate that the Respondent would not deal with the stewards as the bargaining representatives of the unit employees arose out of that meeting. Otherwise, the Respondent's conduct prior to the meeting at issue evidences the Respondent's willingness to deal with the stewards as the employees' bargaining representatives. In these circumstances, I find that McCann's remark does not reflect a policy of refusing to deal with the stewards as the bargaining representatives of the unit employees.

Thus, since the maintenance of an unlawful policy has not been shown, McCann's remark was at most a de minimis violation of the Act. In my view, "the alleged misconduct here is of such obviously limited impact and significance that we ought not to find that it rises to the level of constituting a violation of the Act. The Board's rising case load and the problems involved in handling it could be alleviated if cases of this type were not processed."[5]

More importantly, the parties' collective-bargaining relationship was in its infancy. It appears that the employer's workforce had not previously been unionized. Consequently, it is not surprising that some members in the management chain may not have been familiar with the many requirements of the Act. During periods such as this, the Board should be reluctant to expend its resources when a technical de minimis violation of the Act is involved. Rather, the Board should stay its hand in favor of leaving it to the parties to work out potential conflicts in their relationship within the framework of their legitimate expectations and demands.

All of this, in my view, requires us to recognize that at this stage of the parties bargaining relationship, it is desirable that the mutual education of the parties regarding the rights and obligations that arise within the context of the bargaining relationship should be left to the parties themselves. For such a mutual education furthers the bargaining process and the development of the trust which is essential to the well being of that relationship. It is, therefore, far preferable to the unilateral filing of charges and the pursuit of litigation before the Board that

[2] All dates refer to 2001.

[3] As noted by my colleagues, during the same meeting in which McCann made the remark found unlawful, Human Resources Generalist DiPietro told Steward Feldman that he was not to be present since there was no grievance procedure and no contract, and, after the meeting, DiPietro refused to furnish Steward Ambrose with a copy of Durant's disciplinary consultation form. As to DiPietro's statement, I note that it is not alleged to be unlawful, but is simply referred to, together with DiPietro's refusal to furnish the disciplinary consultation form, as support for the judge's finding, based on credibility, that McCann actually made the remark at issue here. Thus, it is only comments and actions made in connection with a meeting at which stewards were not lawfully entitled to be present that can be said to support a finding that the Respondent would not deal with the stewards as the bargaining representatives of the unit employees.

[4] *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

[5] *Musicians, Local 76 (Jimmy Wakely Show)*, 202 NLRB 620, 621 (1973). Accord: *Bellinger Shipyards, Inc.*, 227 NLRB 620 (1976); *Wichita Eagle & Beacon Publishing Co.*, 206 NLRB 55 (1973); and *Square D Co.*, 204 NLRB 154 (1973).

we have here. In sum, it benefits neither the parties, nor the Board, nor the public's interest in the development of productive and stable labor relations to encourage the litigation of these kinds of matters at this stage in the parties' relationship. By declaring what occurred here an unfair labor practice that requires the issuance of a cease and desist order, I fear that the Board does precisely that.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to give the Union the information that it needs to represent you.

WE WILL NOT tell the union shop steward to have other union representatives make information requests to our lawyer.

WE WILL NOT tell our employees that we do not recognize the union shop stewards as the employees' collective-bargaining representative as designated by the Union.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL give the Union the information it needs to represent you.

DISH NETWORK SERVICE CORP.

Joanna Piepgrass, Esq., for the General Counsel.
George Basara, Esq. (Buchanan Ingersoll, P.C.), of Pittsburgh, Pennsylvania, for the Respondent.
Lowell Peterson, Esq. (Meyer, Suozzi, English & Klein, Esqs.), of New York, New York, for the Union.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge: Based upon a charge and a first amended charge filed, respectively, on December 19, 2001, and February 20, 2002, by Local 1108, Communications Workers of America, AFL–CIO (the Union), a complaint was issued on March 1, 2002, against Dish Network Service Corp. (Respondent).

The complaint alleges that the Respondent (a) threatened employees with discipline if they discussed with their coworkers or shop stewards disciplinary meetings held by the Respondent; (b) told its employees that the Respondent did not recognize the Union as the employees' collective-bargaining representative; and (c) told its employees that the Respondent did not recognize the union shop stewards as the employees' collective-bargaining representative, as designated by the Union. The complaint also alleges that the Respondent refused to furnish certain requested information to the union shop steward, and instead directed the steward to have other union representatives make the information request to the Respondent's counsel. The complaint further alleges that the Respondent reneged on an agreement between it and the Union resolving a disciplinary grievance. The Respondent timely filed an answer which was amended at the hearing. On May 7, 2002, a hearing was held before me in Brooklyn, New York. Upon the evidence presented in this proceeding, and my observation of the demeanor of the witnesses and after consideration of the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a domestic corporation and subsidiary of EchoStar, having its principal office and place of business at 501 South Santa Fe Drive, Littleton, Colorado, and a place of business at 85 Schmidt Boulevard, Farmingdale, New York, has been engaged in the commercial installation and maintenance of satellite dishes. During the past year, Respondent has purchased and received at its Farmingdale facility, goods and materials valued in excess of $50,000 directly from suppliers located outside the State of New York. The Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Alleged Unlawful Comments by the Respondent's Officials

1. The facts

On June 21, 2001,[1] the Union was certified by the Board as the exclusive collective-bargaining representative of the employees in the following appropriate collective-bargaining unit:

> All full-time and regular part-time field installation technicians employed by Respondent at its Farmingdale facility, located at 85 Schmidt Boulevard, Farmingdale, New York, excluding all office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

[1] All dates hereafter are in 2001.

Following the certification, collective-bargaining negotiations have taken place but no agreement has been reached. There is no grievance procedure in effect.

On about December 9 field service technician Derrick Durant returned late from his route.[2] He was expected back at 5:30 p.m. but returned to the facility shortly after 9 p.m., having told Manager Charles Jerabek that he was lost en route.

a. December 12—The morning meeting

Durant testified that when he arrived at work at 7 a.m. his supervisor, Field Service Manager Thomas Murphy said that he had to "write [him] up" for returning late the night before. Also present in the room was Manager Jerabek.

Durant asked that a shop steward be present during the meeting. Murphy gave permission and Durant asked David Gerace, the Union's steward, to attend. With Gerace present, the two managers said that Durant took too long to return to the plant. Gerace testified that following a brief caucus with Durant in the hallway, he told the managers that he did not believe that this was a major violation worthy of any discipline, including written discipline. Durant testified that they "worked out an arrangement" whereby they agreed to "let it go away" with a verbal warning provided that Durant would be more careful of his time in the future.

After the meeting, Gerace briefed Co-Shop Steward Brian Feldman on the matter, telling him that Durant was concerned that he was going to be written up, that he spoke with the two managers and they agreed to give him a verbal warning with the condition that he would be more careful with his time in the future.

Manager Murphy, who had been a supervisor only a couple of weeks at the time of the incident, testified that based upon Durant's lengthy time between stops on December 9 he decided to give him a verbal warning. This decision was made with manager Jerabek on the morning of December 12 before he met with Durant. On December 12, he told Durant that his performance did not meet the Respondent's standards, and that in the future if he was lost he must contact his supervisor. Murphy stated that Steward Gerace did not attempt to negotiate anything other than a verbal warning. Gerace participated in the meeting, asking Murphy to clarify certain statements and following the meeting, asking for copies of travel times and distances that Murphy referred to.

Murphy denied that Gerace said that Durant should receive no discipline. Murphy also stated that Gerace did not attempt to negotiate anything other than a verbal warning, and he denied agreeing to ignore the alleged misconduct.

Sometime thereafter that day, Murphy told Human Resources Generalist Lynn DiPietro of the verbal warning given to Durant. DiPietro informed Murphy that even a verbal warning must be memorialized in written form. She gave Murphy a sample employee consultation form which he then completed. The employee consultation form is dated December 12 and essentially states that on December 9, Durant took too much time in between jobs, and was late returning to the office. The form contained an "action plan" which was "to keep an eye on Derrick's traveling times and keep in contract with him via Nextel, to assist in any possible traveling problems. Will meet on January 12, 2002 for further review of this matter." In the column "verbal or written warning" was the notation "verbal 12/12/01."

Murphy also told DiPietro that Gerace was present during the consultation. DiPietro testified that she believed that it was inappropriate and unnecessary for a steward to be present because Murphy was simply explaining to Durant that his behavior was unacceptable.

b. December 12—The afternoon meetings

Durant stated that he worked the entire day and returned to the facility at about 5:30 p.m. He reported to the manager's office to return his paperwork and was met by Manager Jerabek, DiPietro, and General Manager Daniel McCann. Durant testified that McCann asked him to sign the employee consultation form. Durant, who was in the office at that time for about 5 minutes, refused to sign it and asked that a shop steward be present. He stated that he was not allowed to get a steward, but he saw Steward Brian Feldman walking by and asked him to come in to the office.

According to Durant, McCann remarked that Feldman could not enter the office because "we have no contract; therefore we don't recognize shop stewards." McCann also said that there was no contract and no arbitration or grievance procedure in effect. Feldman was present with Durant in the doorway for 10 to 15 minutes.

Durant stated that he and Feldman left the office together. Feldman went to the cafeteria and Durant stayed in the hallway because he wanted to speak with the steward. Durant testified that McCann told him that "if I bring this up to any other employee, that further disciplinary action will be taken." In contrast, Feldman testified that he and Durant went to the cafeteria together.

Feldman stated that earlier in the day, Gerace told him that Durant was called into the manager's office for a writeup and was going to be written up, but that the matter would be considered a verbal warning. Feldman stated that Gerace told him that Murphy had issued a verbal warning to Durant with advice that Durant was to call for directions if he got lost.

Feldman further testified that Durant told him that he was being called into the office for a writeup. He accompanied Durant to Murphy's office. Feldman told Murphy that he thought the matter had been taken care of—that if Durant was late returning to the shop he should call and request directions. Murphy replied that such was his understanding of how it was supposed to have been resolved, but DiPietro "got wind of it" and wanted a writeup.[3] The meeting ended after 5 minutes.

Feldman testified that later that day, Murphy told him that they would meet a short time later and asked him and Durant to wait in the cafeteria. They were then called into the meeting. Present were Murphy, Jerabek, DiPietro and McCann. DiPietro

[2] There is a nonmaterial discrepancy in the date of the alleged misconduct—either December 9 or 11.

[3] Gerace testified that 2 months prior to the hearing he received a verbal warning which was not memorialized in a writing. However, Neither DiPietro nor McCann were involved in that matter.

told Feldman that there was no reason for him to be present since this was an "employee-management meeting only." McCann said that "there was no contract between the Union and Dish Network; therefore, he didn't recognize the union, therefore, he didn't recognize me as shop steward and I had to leave." Feldman said that he disagreed, he told Durant not to sign anything, and he left.

Murphy testified that following his instruction from DiPietro to make a written record of the verbal warning, he wrote the employee consultation form set forth above. He asked Durant to come into the office. Jerabek was present. Murphy told Durant that he was told that all verbal warnings must be documented, and gave him the form. Durant said he wanted a shop steward. Steward Feldman entered the office and said that Durant should not be given the paper because he had not committed any similar offenses prior to that time.

DiPietro testified that she overheard Feldman raising his voice questioning Murphy's writing up Durant, and saying that Durant did not recognize the writeup and would refuse to sign it because he had no prior history of such an offense. DiPietro then entered the office and asked Feldman and Durant to leave for a short time. She was told what happened and then asked McCann to join them. DiPietro asked for the details of the discussion and why Feldman was present and raising his voice, objecting to Murphy's warning to Durant. Murphy said that he told them that he wanted to document their earlier conversation, Durant requested that a steward be present, and it was Feldman's opinion that Durant should not be receiving a verbal warning. The managers discussed the merits of the grievance, and agreed that Feldman should not be present during the imposition of discipline upon Durant. McCann stated that he was "overly concerned" when a steward is involved in a disciplinary matter and he was not made aware of the situation. McCann also stated that upon learning of the facts of the incident and its current status, he was satisfied that the matter was thoroughly investigated by Murphy and Jebanek, the investigation was over, and that the matter was then a "disciplinary process."

Following their discussion, the managers called Durant and Feldman back into the meeting.

McCann and DiPietro testified that they told Feldman that since the matter was in the "discipline part of the consultation" it was "not necessary" that he be present, and he should leave. DiPietro testified that she told Feldman that "he was not to be present because we did not have a grievance procedure agreed upon, there was no contract, that he was not to be present during employee consultations." McCann quoted DiPietro as saying in essence that "there was no collective-bargaining agreement at that point, and that we're not doing an investigation, so there was no need for his presence . . . there." McCann stated that the disciplinary process was confidential pursuant to the Respondent's handbook, quoted below, and, therefore, Feldman could not be present. McCann further stated that "where if I'm issuing a disciplinary process, that no other employee be present. It's between the manager and the employee, not another employee. So that's why I said—that's why I concurred that Mr. Feldman should leave, because he's another employee . . . and doesn't have the right to know another person's business . . . regardless if he's a shop steward, at that point." McCann further stated: "We were issuing a disciplinary process, at that point. We were no longer conducting any kind of investigation."

Although Murphy had "no problem" with Gerace and Feldman participating in the prior meetings he deferred to DiPietro's experience. DiPietro testified that she believed that Feldman should not be objecting to an employee's consultation when there was no agreed-on grievance procedure in place. In addition, DiPietro stated that the Union's role in the disciplinary process where there is no grievance procedure in effect is to permit the steward to observe but not speak during a consultation. She further stated that although the Respondent has recognized shop stewards, it has not recognized their involvement in the disciplinary procedure, except as observers.

Feldman denied that the reason given for asking him to leave the meeting was because it was for the purpose of issuing a disciplinary notice, or that the meeting was disciplinary in nature, and not investigatory.

Feldman stated that following the meeting he told McCann he spoke with the Union which asked him to advise McCann that he was in violation of the Act, and that charges would be filed. McCann said that the meeting was disciplinary and not investigatory and that the investigation was done. McCann also mentioned that he contacted the Respondent's attorney who advised him that he was "covered" under *Weingarten*.[4] McCann denied speaking with Feldman after he left the room.

When Feldman left the room, the managers told Durant that he was receiving a verbal consultation due to the "unaccounted for" time he took in completing his assignments. They also told him that he must improve his performance. Durant refused to sign the employee consultation form.

McCann denied threatening Durant with discipline if he mentioned the matter to any other employee, or discussed with his coworkers or steward disciplinary meetings held by the Respondent. Murphy and DiPietro denied hearing McCann threaten Durant in such a manner. Nor did Murphy hear McCann say that the Respondent did not recognize the Union or the shop steward as the employees' representative. McCann denied disciplining Murphy for permitting Gerace and Feldman to attend the sessions with Durant. McCann further denied telling employees that the Respondent did not recognize the Union as the employees' collective-bargaining representative. He stated that he recognized the Union and the shop stewards as the representatives of the employees in the facility.

Durant testified that one or 2 days later, Jerabek told him that DiPietro instructed him to document the verbal warning. Jerabek apologized, saying that he was "forced" to write him up.

DiPietro stated that following the certification of the Union, the Respondent has recognized the shop stewards as the employees' representatives, and the stewards have attended collective-bargaining negotiation sessions, and have been involved in various disciplinary actions with the Respondent.

[4] *NLRB v. Weingarten*, 420 U.S. 251(1975).

2. Analysis and Discussion

a. The alleged threat

The complaint alleges that McCann and DiPietro threatened employees with discipline if they discussed with their coworkers or shop stewards, disciplinary meetings held by the Respondent.

The alleged threat relates to Durant's testimony that following his meeting with McCann, he left the office and waited in the hallway while Feldman went to the cafeteria. It was while waiting in the hallway that McCann allegedly threatened him with "further disciplinary action" if he brought "this up to any other employee."

First, there is no evidence that DiPietro threatened employees in any manner. Second, I cannot credit Durant's claim that McCann threatened him. Durant's account differs from Feldman's, who stated that he and Durant left McCann's office together, went to the cafeteria together, and waited there together until they were called into the meeting with the Respondent's managers. Accordingly, there is no evidence that Durant was alone in the hallway with McCann.

In addition, I cannot rely upon Durant's testimony which was faulty in a critical manner. He stated that he was presented with the written consultation form in the morning meeting with Murphy. That could not have happened since the credited testimony of Murphy and DiPietro was that Murphy only verbally counseled Durant at that meeting. It was only later, after being told by DiPietro that he must memorialize the verbal warning in written form that he prepared the consultation form. In this regard, the testimony of Murphy and DiPietro are consistent and worthy of belief and such testimony is credited.

Further, Gerace, who was present with Durant at the morning meeting, did not testify that he saw the written employee consultation form. I accordingly credit McCann's denial that he threatened Durant as alleged.

I will accordingly recommend that this allegation be dismissed.

b. The statements that the Respondent did not recognize the Union or its shop stewards

The complaint alleges that on December 12, McCann told employees that the Respondent did not recognize the Union as the employees' collective-bargaining representative and did not recognize the union shop stewards as the employees' collective-bargaining representative, as designated by the Union.

As set forth above, Durant testified that McCann said that Feldman could not enter the office because the Respondent has no contract and therefore does not recognize shop stewards. Feldman testified to essentially the same statement by McCann. Feldman stated that during that meeting, he was told by McCann that since there was no contract between the Union and the Respondent, therefore he did not recognize the Union or him as steward.

The testimony of DiPietro is instructive. She stated that she told Feldman that he could not be present during the discipline of Durant because there was no contract between the parties and no grievance procedure in place. She further stated that the shop steward could only observe the discipline but not speak during an employee's consultation. Of course, this position stated at hearing differed from what took place since Feldman was not permitted to even observe Durant's consultation. DiPietro further stated that the Respondent does not recognize the steward's involvement in the disciplinary procedure, except as observers.

In denying the statements attributed to him, McCann testified that he recognized the Union as the certified bargaining representative of the employees and also recognized the stewards as the employees' representative in the facility. He gave examples of his recognition of the Union and the stewards: The stewards attend collective-bargaining negotiations and have been involved in certain disciplinary proceedings.

I credit the testimony of Durant and Feldman as to the statement concerning the shop stewards. Their versions of the statements made by McCann are consistent and believable given the fact that McCann refused to permit the steward to be present during the discipline of Durant, and given the Respondent's policy of not recognizing the steward's right to be present during disciplinary interviews, or permitting the steward to be present but not participate.[5] In effect, this is a policy of not recognizing shop stewards, as alleged. In addition, the Respondent's admitted refusal to provide Steward Sean Ambrose with a copy of Durant's consultation is further evidence that the Respondent did not recognize the stewards' representational role, and supports a finding that McCann told that to Durant and Feldman.

"Union stewards are an important part of the mechanism of maintaining stable labor relations in the shop through the administration of collective-bargaining agreements and the adjustment of grievances." *Capitol Trucking, Inc.*, 246 NLRB 135, 139 (1979). McCann's statement to Durant and Feldman that he did not recognize the shop stewards interferes with the employees' right to be represented by their representatives and violates Section 8(a)(1) of the Act. *Capitol Trucking*, supra at 141.

However, I cannot credit Feldman's testimony that McCann said that he did not recognize the Union. This comment was allegedly made during the meeting at which Durant was also present yet Durant did not corroborate Feldman's testimony. It is apparent that the Respondent recognizes the Union in that collective-bargaining negotiations are ongoing. I, therefore, credit McCann's denial of this statement attributed to him.

B. The Alleged Refusal to Furnish Information

DiPietro testified that some time after December 12, Shop Steward Sean Ambrose asked her for a copy of Durant's consultation form. She told him to speak to his union representative, meaning the chief Union Negotiator Dennis Trainor, and request it through the Respondent's attorney. At the time, collective-bargaining negotiations were ongoing and apparently the Respondent's attorney had been turning over requested documents to the Union at the bargaining table.

[5] "The *Weingarten* rule applies when an employer conducts an investigatory and/or disciplinary interview with an employee." *Consolidated Edison of New York*, 323 NLRB 910, 911 (1997).

DiPietro stated that the Respondent's policy concerning confidentiality of personnel files prohibited her from giving Ambrose a copy of the consultation form. That policy states:

> Personnel Files
>
> All personnel files are the sole property of EchoStar and are deemed to be confidential. The content of these files will not be distributed to any employee or former employee for any reason. Current employees may review the contents of their personnel file in the presence of their department manager or supervisor, or a representative of the Human Resources Department. Employees who wish to review their own file should contact the Human Resources Department.

DiPietro stated that the consultation form is considered a personnel record which is covered by the above policy. She explained that the policy prohibits the release of personnel records to employees other than the employee involved in the personnel action. She stated that since Ambrose was an employee he could not be given the form, even though he was also a shop steward.

However, at the request of the Union during negotiations, DiPietro gave copies of employee consultations to the Respondent's attorney which were then turned over to the Union. She is aware that Stewards Ambrose, Feldman, and Gerace are present at negotiations on behalf of the Union, but she is not aware as to whether the documents she made available to the Union are shared with those employees. DiPietro stated that she believed that the consultation form at issue was turned over to the Union's negotiators.

The Respondent's original answer and its amended answer made at the hearing admitted that on or about December 13, 2001:

> (a) The Union, by its shop steward, requested that Respondent furnish it with a copy of a written disciplinary action it issued to employee Derrick Durant.[6]
>
> (b) Respondent, by DiPietro . . . refused to furnish the requested information described above in (a) to the Union shop steward. Ms. DiPietro asked that the steward make the request through his Union representative as part of the ongoing collective-bargaining process.[7]
>
> (c) Respondent, by DiPietro . . . upon declining to honor the request of the Union's shop steward to provide the information described above in (a), directed the Union shop steward to have other Union representatives make the information request to Respondent's counsel.[8]

The Respondent's answer denied that the requested information was necessary for, and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit employees.

Thus, it is undisputed that the Union requested a copy of the written consultation form completed for Durant, and the Respondent refused that request and asked that the steward request such information through his union representative during bargaining.

The Board and the courts have long held that an employer is statutorily required, upon request, to provide information that is relevant to and necessary for its employees' bargaining representative to carry out its statutory duties and responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

It is clear that the document requested related to discipline of bargaining unit employees and as such was presumptively relevant to the Union's performance of its statutory functions. *Booth Newspapers, Inc.*, 331 NLRB 296, 299–300 (2000). The Respondent has not met its burden of showing that the information requested is not relevant.

The Respondent argues that its personnel policy provides that the contents of employee personnel files are confidential and may not be given to any employee for any reason. In *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), the Supreme Court held that under certain circumstances, confidentiality claims may justify a failure or refusal to provide relevant information to a union. When an employer raises a "legitimate and substantial" claim of confidentiality, the Board must balance the union's need for the information against the legitimate confidentiality interest established by the employer. However, in those instances, the employer "bears the burden of demonstrating that its refusal to furnish relevant and necessary information to a labor organization is excusable because the requested data is privileged information." *Aerospace Corp.*, 314 NLRB 100, 103 fn. 10 (1994).

The Respondent has not met its burden here. Its basis for refusing to turn over Durant's consultation form to Steward Ambrose was that the document was covered by its personnel policy prohibiting the release to any employee for any reason. No special reason for the policy has been cited. The Respondent's argument is, in essence, that its employees' personnel files are per se confidential. The Board has "repeatedly rejected the blanket confidentiality claims as an inadequate defense for an employer's per se refusal to furnish any information from an employee's file." *Wayne Memorial*, 322 NLRB 100, 103 (1996); *Washington Gas Light Co.*, 273 NLRB 116 (1984). Accordingly, the Respondent had not established a "legitimate and substantial" claim of confidentiality.

Similarly, the Board has found unlawful an employer's refusal to supply information to a union agent, instead directing him to submit all information requests to its labor counsel. *Wayne Memorial*, supra at 109. Here, the Respondent did the same thing. DiPietro asked Ambrose to make his request to the Union negotiator who could ask for the information from the Respondent's attorney. In addition, a union is entitled to designate who it wishes to represent it. *People Care*, 327 NLRB 814, 825 (1999). A shop steward is entitled to make a request for information and an employer is obligated to provide the requested information to the steward. The only reason that the Respondent has given for refusing to turn over the document to Ambrose was that the material requested had been provided by the Respondent to its attorney for distribution to the Union at the bargaining table. This is not a legitimate reason to refuse to provide the information to the steward who had a lawful right to receive the requested information.

[6] Par. 12(a) of the complaint.
[7] Par.12 (c) of the complaint.
[8] Par. 12(d) of the complaint.

C. The Alleged Reneging on an Agreement Resolving a Grievance

The complaint alleges that on about December 12, DiPietro and McCann reneged on an agreement between the Respondent and the Union resolving a disciplinary grievance.

In her posthearing brief, counsel for the General Counsel moved to withdraw that allegation "based on evidence adduced at the hearing." The Union objected to the motion to withdraw the allegation and asserts that the evidence supports the allegation.

I deny the General Counsel's motion to withdraw the allegation. Inasmuch as the allegation has been fully litigated, the General Counsel no longer has unreviewable discretion, pursuant to Section 3(d) of the Act, to withdraw the allegation. I accordingly exercise my discretion to deny the motion to withdraw. *Sheet Metal Workers Local 162 (Dwight Lang's Enterprises)*, 314 NLRB 923 fn. 2 (1994).

The Union alleges that an agreement was reached in the morning session with Durant that his discipline would simply be a verbal warning, however at the afternoon meeting the method of discipline was changed to a written confirmation of a verbal warning. It appears that both methods amount to the same thing—a verbal warning. The Respondent's requirement that the verbal warning be reduced to writing is reasonable. If this was not done, there would be no readily available, reliable record of the verbal warning. Such a written record is especially important in view of the Respondent's system of progressive discipline. The fact that Gerace had received a verbal warning in the past which was not put in writing is of no moment since neither DiPietro nor McCann were involved in that transaction.

I accordingly cannot find that there was an "agreement" between the Respondent and the Union resolving Durant's grievance in the form of a verbal-only warning. While it is true that at the morning meeting there was no mention of the need to confirm the warning in writing, the effect of doing so later does not change the form of the warning—it was verbal only. Therefore, it cannot be said that the Respondent reneged on any agreement to impose a verbal warning on Durant.

CONCLUSIONS OF LAW

1. Dish Network Service Corp. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 1108, Communications Workers of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Union has been, and is, the exclusive representative of the employees in the following appropriate collective-bargaining unit within the meaning of Section 9(a) of the Act:

> All full-time and regular part-time field installation technicians employed by Respondent at its Farmingdale facility, located at 85 Schmidt Boulevard, Farmingdale, New York, excluding all office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

4. By failing and refusing to furnish the Union with a copy of a written disciplinary action it issued to employee Derrick Durant, and by declining to honor the request of the Union's shop steward to provide that information and instead directing the union shop steward to have other union representatives make the information request to the Respondent's counsel, the Respondent violated Section 8(a)(5) and (1) of the Act.

5. By telling employees that the Respondent did not recognize the union shop stewards as the employees' collective-bargaining representative as designated by the Union, the Respondent violated Section 8(a)(1) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Dish Network Service Corp., Farmingdale, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to furnish a copy of an employee's disciplinary action to the Union's shop steward.

(b) Directing that the union shop steward have other union representatives make information requests to the Respondent's counsel.

(c) Telling employees that the Respondent did not recognize the union shop stewards as the employees' collective-bargaining representative as designated by the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish a copy of the disciplinary action of Derrick Durant to the Union's shop steward.

(b) Within 14 days after service by the Region, post at its facility in Farmingdale, New York, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility in-

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

volved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 12, 2001.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.